

1918

# Freedom of Speech and of the Press

W.R. Vance

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Vance, W.R., "Freedom of Speech and of the Press" (1918). *Minnesota Law Review*. 2473.  
<https://scholarship.law.umn.edu/mlr/2473>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# MINNESOTA LAW REVIEW

---

VOL. II

MARCH, 1918

No. 4

---

## FREEDOM OF SPEECH AND OF THE PRESS

AMERICANS should not be greatly surprised that Russian exiles, returning from the United States to receive a Maximalist welcome in their native country, should have reported that American liberty was a fraud and delusion, or that the Maximalists in Petrograd should so fiercely resent the conviction of Alexander Berkman and Emma Goldman for resistance to the Draft Act\* that they have given public notice of their intention to hold the American Ambassador as a sort of hostage for these two Bolshewiki, so sadly out of place. The Russian who drank in with his mother's milk the doctrine that liberty necessarily involves opposition to the existing government, and that freedom is exemption from police interference, finding in America that he can no more do what is contrary to the law than he could in Russia under the Czar, naturally reaches the conclusion that the term "the land of the free" is a hollow mockery. Especially is he shocked when he discovers that in spite of the oft heard statement made by the champions of English liberty, and echoed by the courts, that freedom of speech and freedom of the press are the cornerstones of Anglo-Saxon democracy,<sup>1</sup> and in spite of the clear and vigorous language of the first amendment to the constitution of the United States that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"

---

\*See *Goldman v. United States*, (1918) U. S. Adv. Ops. 1917, p. 215.

<sup>1</sup> See, for example, *State v. Pierce*, (1916) 163 Wis. 615, 158 N. W. 696.

he is promptly arrested and imprisoned if he counsels, orally or in writing, resistance to the laws of the land. This confusion of mind is by no means lessened when he sees ignorant members of the I. W. W. hauled, fairly in droves, to prison on charges of sedition and encouraging resistance to the law, while at the same time prominent members of Congress and distinguished citizens outside of Congress, with impunity, make heavy charges of incompetence and even of dishonesty against the government and its officers. In the confusion of a swift moving scene in a strange land it is not surprising that the Russian attorney for the unfortunate Russians who had talked not wisely but too much, should, with total unconsciousness of the exquisite humor concealed in the remark, have complained bitterly to the law officers of the federal government that Berkman and Miss Goldman had been denied the immemorial privileges of Englishmen. Undoubtedly it is difficult to determine how to draw the line just at the place where criticism of the government and its measures becomes opposition to the government and resistance to the laws. The purpose of this paper will be to attempt to set forth as clearly as possible just where and how this line is drawn.

In addition to the provision of the federal constitution above quoted,<sup>2</sup> each of the states has incorporated in its constitution a provision of similar import. For example, Article 3 of the Bill of Rights in the constitution of Minnesota provides that:

"The liberty of the press shall forever remain inviolate, and all persons may freely write, speak and publish their sentiments on all subjects, being responsible for the abuse of such right."<sup>3</sup>

---

<sup>2</sup> The first amendment of the federal constitution in full reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This amendment is expressly a limitation upon the power of Congress, and not upon the states. Justice Harlan dissenting in *Patterson v. Colorado*, (1907) 205 U. S. 454 (464), 51 L. Ed. 879, 27 S. C. R. 556, 10 Ann. Cas. 689, was of the opinion that the right of free discussion given by the first amendment was one of the attributes of federal citizenship protected against state action by that clause of the fourteenth amendment forbidding any state to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and also by the clause of the same amendment forbidding the states to deprive any person of his liberty without due process of law. Miller, J., was of different opinion in *Butchers' Association v. Crescent City Live Stock Co.*, (1872) 16 Wall. (U. S.) 36 (74), 21 L. Ed. 394; as was Chief Justice Waite in *United States v. Cruikshank*, (1875) 92 U. S. 542, 23 L. Ed. 588. See also *In re Quarles*, (1894) 158 U. S. 532 (535), 39 L. Ed. 1080, 15 S. C. R. 959.

<sup>3</sup> The constitution of Massachusetts, Part 1, Article 16, limits the guar-

In the first place it is to be noted that while the provision of the federal constitution does not contain the statement that persons are responsible for the abuse of the right given, as do most of the state constitutions, yet such a limitation upon the apparently unqualified language of the federal constitution is necessarily implied. That even the most jealously guarded guaranties of the federal constitution, as for instance that of "life, liberty and property," are qualified by other provisions of that instrument and by the requirements of the police power of the several states, is so well known and well settled that it may be stated without argument or citation of authority. If illustration were needed it could be strikingly found in the recent decision of the Supreme Court of the United States holding constitutional the selective draft act, depriving certain citizens of their liberty, often much against their will.<sup>4</sup> If personal liberty can be sacrificed in the interest of public defense, it would be indeed a strange thing if the liberty of the press and of speech were to be so absolute as to permit its exercise in aid of the enemy, or otherwise in antagonism to the public welfare. But the difficult question to be settled is how far may the government go in restricting the freedom of discussion in order to protect the public welfare?

Before attempting to arrive at the answer to this question there are two perfectly simple propositions which must be stated and set aside in order to avoid confusion of thought. The first of these is that these constitutional guaranties protect the citizen only from suffering legal consequences at the hands of the government authorities acting in the alleged enforcement of law. They do not, and cannot, protect the citizen against the social consequences of exercising his legal privilege to say what he pleases. Every citizen of the United States has the right, generally speaking, to bray like an ass if he wishes; but he need not expect the constitution of the United States to protect him against the unpleasant social consequences of being regarded as an ass. The preacher in the pulpit is undoubtedly within his legal rights if he should say that Satan, in the midst of his most diabolical activities, was a Christian gentleman if he chanced to wear a German helmet; but he should not expect the constitution to keep him

---

anty to liberty of the press. See *Commonwealth v. McCann*, (1913) 213 Mass. 213, 100 N. E. 355.

<sup>4</sup> *Arver v. United States*, (1918) 38 S. C. R. 159, U. S. Adv. Ops. 1917, page 193. See also *Jacobson v. Massachusetts*, (1905) 197 U. S. 11, 49 L. Ed. 643, 25 S. C. R. 358, 3 Ann. Cas. 765.

long in an American pulpit thereafter. The college professor who should say to his class that the moon was made of green cheese, or that the *Lusitania* was sunk strictly in accordance with international law, or that all forms of government were essentially bad and should be abolished, might well be within his constitutional rights, but ought not to expect long to be within his classroom. So it was a foolish member of a social club who, having been expelled for publishing certain uncomplimentary comments about his fellow members, asked a court to compel his reinstatement on the ground that the constitution permitted him freely to "speak, write and publish" his sentiments on all subjects.<sup>5</sup> The constitution will protect a man against legal punishment for merely foolish talk, but it cannot protect him from the social consequences.

The second elementary proposition is that this provision of the federal constitution, and of the state constitutions as well, does not create the right of freedom of speech and of the press, but merely protects an existing right from abridgment or interference.<sup>6</sup> In view of this fact our problem is, then, reduced to a determination of the scope and extent of the existing right of free publication and free speech at the time of the adoption of the federal constitution. It may be well also, before attempting such determination, to call attention to the fact that this constitutional guaranty is available only to citizens of the United States and does not extend to aliens;<sup>7</sup> and further that it has no necessary application to the rules and regulations of the Post Office department as to exclusion from the mails.<sup>8</sup> A refusal by the government to carry in its mails a book or periodical does not prohibit its publication. Neither does a statute prohibiting political activity on the part of employees and officers of the government deprive them of their right freely to speak and write their opinions.<sup>9</sup> By withdrawing from the government service, as they freely may, they escape the restraint laid upon their political activity; and the government has the right to make reasonable rules

---

<sup>5</sup> *Barry v. Players*, (1911) 130 N. Y. Supp. 701.

<sup>6</sup> *Cooley*, Constitutional Law 299.

<sup>7</sup> *Goldman v. Reyburn*, 36 Pa. Co. 581; *United States v. Williams*, (1904) 194 U. S. 279, 48 L. Ed. 979, 24 S. C. R. 719.

<sup>8</sup> *Lewis Publishing Co. v. Morgan*, (1913) 229 U. S. 288, 57 L. Ed. 1190, 33 S. C. R. 867. See especially *Masses Publishing Co. v. Patten*, (C. C. A. 1917) 246 Fed. 24, 45 Wash. L. Rep. 706, reviewing the cases.

<sup>9</sup> *Duffy v. Cooke*, (1913) 239 Pa. St. 427, 86 Atl. 1076, Ann. Cas. 1915A 550.

and regulations governing the conduct of its employees so long as the good of the service is the bona fide purpose of such regulation.

What, then, was the scope and extent of the right of free discussion at common law at the time that the federal constitution was adopted? A distinguished writer on constitutional law gives the following answer:<sup>10</sup>

"We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

Vann, J., in the famous case resulting in the conviction of Johann Most of a seditious publication, gives expression to the same principle in the following vigorous language:<sup>11</sup>

"It [the constitution] places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self preservation."

There is a very general impression, even among lawyers, that the right of free discussion, whether oral or in writing, is one of the fundamental rights of Englishmen; that it is somehow a part of the English constitution. But such is not the case.<sup>12</sup> It is true that English judges have not infrequently spoken of the freedom of speech as a recognized, though restricted, right, and famous statesmen and publicists have, from time to time during the long struggle for English liberty, eulogized the right of free discussion of public events as the palladium of the constitution, and the greatest engine of public safety. Sir James Mackintosh, in the case of Peltier,<sup>13</sup> indicted for seditious libel, said:

"There is one country [England] where man can freely exercise his reason on the most important concerns of society, where he can boldly publish his judgment on the acts of the proudest and most powerful tyrants."

Milton's famous essay, "Areopagitica," is an eloquent argument for the right of free discussion of public events, although

<sup>10</sup> Cooley, *Constitutional Lim.* 518.

<sup>11</sup> *People v. Most*, (1902) 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509.

<sup>12</sup> See Dicey, *Law of the Constitution*, fourth ed., 236.

<sup>13</sup> *Rex v. Peltier*, (1803) 28 St. Tr. 529.

he is very careful to make it clear that the principles that he contends for so vigorously, have no application to Papists. In the same manner Erskine would pause in the midst of his glowing periods in eulogy of the right of free speech to express his entire approval of the denial of that right to religious heretics.<sup>14</sup> In view of such statements on the bench, at the bar and in Parliament, it is rather surprising that we find no mention of such right in the Petition of Right (1628), or the Bill of Rights (1689), the two great constitutional documents that are the direct forerunners of our own Bill of Rights. In fact until comparatively recent times, the right of public discussion so far from being free, was very narrowly restricted. When Henry VII introduced the printing press into England it seems to have been taken for granted that the press could be used only by license of the King.<sup>15</sup> The granting of such license, which was continued through succeeding reigns, was probably at first intended more as a means of securing a monopoly to the licensee than as a device of censorship, but in the time of Elizabeth the practice of using the license as a means of controlling the character of publications had become well established. During the reign of James I the Star Chamber had taken over the regulation of the press, and, true to its evil genius, had soon developed it into a very effective engine of oppression. Unlicensed publishers were punished by whipping, the pillory and imprisonment.<sup>16</sup> With the fall of the Star Chamber in 1641 Parliament took over the press censorship, but the restraints imposed upon all publications were scarcely less oppressive. After the Revolution of 1688 these regulations gradually fell into disuse, and after the expiration of the last licensing act in 1694 it was never renewed.<sup>17</sup>

But even after the Englishman had become thus free to print, just as he might speak, what he would without previous license, he remained fully liable either in civil action or in criminal prosecution for any wrong committed in the exercise of his freedom. To use the blunt language of Lord Kenyon:<sup>18</sup>

"It [the liberty of the press] is neither more nor less than this, that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes that which is blamable."

---

<sup>14</sup> See 70 Cent. Law J. 189.

<sup>15</sup> Paterson, *Liberty of Press and Speech* 44.

<sup>16</sup> *Ibid.* 77.

<sup>17</sup> *Ibid.* 46.

<sup>18</sup> *Rex v. Cuthell*, (1799) 27 St. Tr. 641 (675).

To the same effect is Dicey's statement<sup>19</sup> that:

"Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written."

According to common law standards a man is not free to make false statements injuring the reputation of another though made with good intention. There were, however, certain relations in which communication of information was so essential to the public welfare that there arose exceptions to this rule. In some instances public policy so clearly demanded immunity for utterances that the law would not allow them to be drawn into question at all, as for instance, statements made in Parliament or by a judge on the bench. Such statements were said to be absolutely privileged. In other relations where the public interest was less deeply involved, communications were made subject only to a qualified privilege, being actionable only if proved to be malicious as well as false. It was about this doctrine of qualified privilege for discussion of men and measures as applied to charges of seditious libel that the fiercest battles were fought; and it was in these notorious state trials that we find most of the famous statements made about the freedom of speech and of the press, which, it should be noted, were made by barristers and judges in their efforts to define the common law crime of seditious libel.

Closely akin to the crime of seditious libel was that of blasphemy, which consisted in denying any of the tenets of the established religion, or criticising the practices or prelates of the established church. The common law attitude toward religious discussion is well represented by the statement of Hale, J.,<sup>20</sup> "To say that religion is a cheat is to dissolve all those obligations whereby civil societies are preserved." In the time of Elizabeth any criticism whatever of the church was deemed ipso facto an attempt to subvert the government. In the time of the Stuarts the subservient judges pushed this doctrine of blasphemy and sedition so far, in response to orders from their royal masters, that an unfortunate author of a book attacking the stage, which was then under the patronage of the Merry Monarch's queen, was indicted for saying that "dancing was the devil's profession, and fiddlers were the minstrels of the devil." The presiding judge decided that this was a seditious libel of so wicked a

---

<sup>19</sup> Dicey, *Law of the Constitution* (fourth ed.) 234.

<sup>20</sup> *Reg. v. Taylor*, (1687) 1 Ventris 293.



character that it made his blood boil. The unhappy defendant had his ears cut off, was put in the pillory, fined five thousand pounds and imprisoned for life.<sup>21</sup> The prosecutions for sedition and blasphemy in the time of the Stuarts, and the barbarous ferocity of the punishments inflicted,<sup>22</sup> form one of the darkest pages in the history of English law, which one cannot read without the conviction that the bloody Jeffreys justly bears the infamy that attaches to his name.

Another restriction at common law upon freedom of discussion nearly related to the crime of blasphemy was that of making an immoral or obscene publication. This crime, originating in the Ecclesiastical courts, and growing to vigor under the sympathetic ministrations of the Star Chamber, came subsequently to be recognized in Westminster Hall as a common law crime. As late as 1765 Wilkes was indicted and convicted for the publication of his "Essay on Woman," which was deemed so indecent as to be an offense at common law.<sup>23</sup>

At common law no person without license might publish any account of Parliamentary debates. Any person doing so might be punished as guilty of a breach of the privilege of the House. In the eighteenth century, however, newspaper reports became more and more frequent until finally no further attempt was made to prevent their publication, although the Parliamentary order prohibiting such publication has never been rescinded.<sup>24</sup>

The common law did not permit anyone to write or speak anything that would corrupt or interfere with the administration of justice. Therefore any publication imputing misconduct to a judge was an indictable offense. The right of every court to protect itself in the discharge of its functions by contempt proceedings has been long recognized, this power on the part of the courts being coeval with the common law.<sup>25</sup>

It is now necessary to consider briefly the status of the so-called freedom of the press and of speech in the colonies prior

---

<sup>21</sup> *Rex v. Prynne*, (1632) 3 St. Tr. 561.

<sup>22</sup> As late as 1656 a certain Quaker, obviously insane, was convicted of blasphemous personation of the Saviour and punished by having his tongue bored with a red hot iron, by having a letter "R" branded upon his forehead, and was whipped, and pilloried. See Paterson, *Liberty of Press and Speech* 68.

<sup>23</sup> *Rex v. Wilkes*, (1770) 4 Burr. 2527 (2530), 2 Wils. 151, 4 Bro. P. C. 360.

<sup>24</sup> See *Kilbourn v. Thompson*, (1880) 103 U. S. 168, 26 L. Ed. 377; Paterson, *Liberty of Press and Speech* Chap. 6.

<sup>25</sup> See the extended opinion in *State v. Shepherd*, (1903) 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

to the revolution, as throwing light upon the question of what was the right which the first amendment of the constitution of the United States declared should not be abridged.

When the colonists first came to this country in the early part of the seventeenth century they brought with them the then prevailing English views as to restrictions upon the freedom of public discussion, which were in no wise lessened in the severe minds of the Puritans of New England or in the royalist policies of the Cavaliers of Virginia. That stout royalist, Governor Berkeley of Virginia, had no intention of permitting the common people to concern themselves with the affairs of government. We find him, in 1671, thanking God "there are no free schools or printing; and I hope we shall not have these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both."<sup>26</sup> The prohibition of all printing except by license was in full force in Virginia, Massachusetts and New York, and probably in other colonies as well. In 1662 a statute was passed in Massachusetts appointing two licensors of the press and prohibiting the publication of anything whatever not previously approved by these licensors. The laws of Massachusetts were first published in 1649, and those of Virginia in 1682. The unlicensed publisher of the Virginia laws was arrested and held under bond until the pleasure of the King could be made known. The King promptly forbade the further publication of such laws.<sup>27</sup> In fact the requirement of a previous license for publication persisted in Massachusetts more than a score of years longer than in England, having been abolished only in 1719.<sup>28</sup>

The famous Bill of Rights, prepared by George Mason in 1776, for the Virginia constitution, appears to have been the first constitutional document recognizing the existence of the right of free speech and free press. Others of the new states gave recognition in their constitutions to this right, but when in 1787 the federal constitutional convention met, the proposal, made at different times by Mr. Pinckney, that the new constitution should include a guaranty of liberty of the press, received little attention, and was not included in the constitution as finally submitted

---

<sup>26</sup> See 2 Watson, *Constitution* 1400.

<sup>27</sup> 1 Hildreth, *History of the United States* 561.

<sup>28</sup> 4 Harv. Law Rev. 379.

to the states for ratification.<sup>29</sup> The first amendment, in the form in which it was adopted, as is well known, was drawn up by the first Congress at the behest of the legislatures of the several states. Indeed it is worth noting that when the constitutional convention met, it was still strongly affected with the English idea that it was contrary to public welfare that the debates and proceedings should be communicated to the public; hence the convention sat behind closed doors and all its members were enjoined to hold the proceedings secret. Even after the establishment of the new government, the Senate, for several years, refused to open its doors to the public, or allow publication of its debates.<sup>30</sup>

In the light of this brief survey of the development of the so-called common law right of free speech and of free press, what was in the minds of those in Congress who drafted the first amendment, and of the legislatures of the states when they ratified it in these terms: "Congress shall make no law . . . abridging the freedom of speech or of the press?" Was the right of a free press thus guaranteed merely exemption from the requirement of license previous to publication with such liability for the publication as existed by common law rule or might be imposed by statute; or was it intended by this provision to protect a right not only to publication without license, but also to immunity from prosecutions of the vexatious and oppressive sort that had so outraged the lovers of freedom both in England and in the colonies during the preceding century?

There can be no question but that the prevailing view of the American courts is in accordance with the former construction. Blackstone,<sup>31</sup> writing some twenty years before the adoption of the constitution, said that freedom of the press "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. . . . To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government." Delolme,<sup>32</sup> writing

---

<sup>29</sup> 2 Watson, *Constitution* 1401.

<sup>30</sup> Cooley, *Constitutional Lim.* 515.

<sup>31</sup> 4 Black. *Commentaries* 151. In *Rex v. St. Asaph*, 3 T. R. 428, note a (431), Lord Mansfield said: "The liberty of the press consists in printing without any previous license, subject to the consequence of law."

<sup>32</sup> Delolme, *Constitutional History of England* 287.

at nearly the same time as the sitting of the federal constitutional convention, took exactly the same view of the common law right. In a recent case<sup>33</sup> the Supreme Court of the United States declared that: "The main purpose of such constitutional provisions is to prevent all such previous restraints as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." The court then proceeds to the length of saying, unnecessarily, "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

The state courts have adopted substantially the same point of view in construing both the special provisions of the state constitutions and the first amendment of the federal constitution. It should be noted, however, that while it appears to be generally assumed that the usual working of the provision as found in the state constitutions, which guarantees to every citizen the right freely to speak, write or publish his sentiments, with responsibility for the abuse of such freedom, merely states expressly what is implied in the briefer form of the federal constitution. Yet there are some cases that find a marked difference in meaning. Thus in a recent Louisiana case,<sup>34</sup> a court enjoined the threatened publication of a false list of petitioners because such publication would not be of defendant's "sentiments," which the constitution gave him an inviolable right to publish, but rather of a mere list of names. The distinction impresses one as being painfully mechanical.

There is not wanting, however, authority<sup>35</sup> for the contention that the intention of those adopting the first amendment was to protect the public not merely against the requirement of previous license, but also against unreasonable and oppressive prosecutions in consequence of publication of statements displeasing to those having control of the machinery of government. There can

---

<sup>33</sup> *Patterson v. Colorado*, (1907) 205 U. S. 454 (462), 51 L. Ed. 879, 27 S. C. R. 556, 10 Ann. Cas. 689.

<sup>34</sup> *Schwartz v. Edrington*, (1913) 133 La. 235, 62 So. 660, Ann. Cas. 1915B 1180. In *Empire Theatre Co. v. Cloke*, (1917) 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E 383 (386), the court said:

"We still think that this second clause of our provision conveys the idea of liberty, unchecked as to what may be published by anything save penalty, and is therefore so material a departure from the meaning given the national provision that the Federal cases have little, if any, significance."

<sup>35</sup> *Cooley*, Constitutional Lim. 517. See also cases cited in notes 63-66, *infra*.

be no doubt that the prosecutions in England, as well as in the colonies, for seditious libel were often highly oppressive to a degree that would not be tolerated in England today, and it seems not unreasonable to infer that the constitution makers had that well known fact in mind, and intended to secure for the citizens of the new Union, not only freedom from press censorship, but also the right freely to discuss public affairs, whether in oral speech or in print, with the same degree of immunity that then existed in England as the result of two centuries of struggle against the claim of the King's divine right to govern. The theory adopted by the courts, that the freedom of the press guaranteed is merely freedom from previous license to print, also illogically ignores the freedom of speech, partner in this guaranty with the liberty of the press. The freedom of speech guaranteed cannot have any relation to previous license, wholly unknown in practice. Surely freedom of speech was intended to mean that a citizen's right to express publicly his opinions concerning public men and public events was to be unrestricted save as he might render himself liable to civil action for slander or criminal prosecution for treason or sedition in accordance with then existing common law rules. It seems strange that in the great mass of the litigation involving the construction of such constitutional guaranties none of the courts seem to have considered the inference here suggested from the association of free speech with the free press, or, indeed, to have given the question of the proper construction of the guaranty that degree of careful consideration which its importance and historical interest deserve and invite. This result no doubt is due, in part, to the fact that the cases involving publication of printed matter are so very much more numerous than those concerning public speech that the judicial mind is apt to confine its attention to the liberty of the press.

From many of the decisions it appears that the requirements of the constitutional guaranty are satisfied if the act of publication is left uncensored and the legislature is free to attach such consequences to the publication as it may see fit. Thus according to this view, it may make criminal a publication that would have been perfectly innocent at common law. One might not at common law be guilty of libeling a man long since dead, yet in a recent case<sup>36</sup> in the state of Washington a man was severely punished for publishing an article tending to bring George Washing-

---

<sup>36</sup> *State v. Haffer*, (1916) 94 Wash. 136, 162 Pac. 45, L. R. A. 1917C 610.

ton into public contempt although the court took judicial notice of the fact that the first president was long since dead, with no descendants in the state, and this on the scant ground that though the statute created a liability not known to the common law, yet it was perfectly valid since it did not require any previous license. In the same state a statute making it a misdemeanor to encourage disrespect for the law, not a crime at common law these two hundred years past, was held for the same short reason not to deprive the defendant of his right to publish his sentiments freely.<sup>37</sup> It would seem that such decisions are as much out of harmony with the spirit of the common law rule crystallized in the constitutional form as the statutes in question are unwisely meddling.

Those statutes which merely render more definite an existing common law rule, or cure a defect in its application, are not obnoxious to the principle just discussed. Examples of such statutes are those making a false charge of unchastity against a woman slanderous *per se*,<sup>38</sup> or declaring slander a misdemeanor,<sup>39</sup> as libel always has been. Of course those statutes making seditious utterances punishable as crimes, such as the Federal Espionage Act,<sup>40</sup> or the Minnesota Loyalty Act,<sup>41</sup> are unassailable, although one could wish the courts had upheld them on the ground that such utterances were crimes at common law and therefore never within the meaning of the freedom guaranteed by the constitution, and not solely on the thin ground that no preliminary license requirement was imposed. These are but instances under the general rule, universally accepted, that this constitutional provision affords no protection for acts which at common law were crimes.

Neither is it necessary to resort to the mere no license theory to support that large class of cases holding that statutes prohibiting utterances, publications or exhibitions tending to incite breaches of the peace, cause riots and disorder, to corrupt public morals, endanger public safety, or otherwise affect injuriously the public welfare, do not invade the constitutional right of freedom

<sup>37</sup> *State v. Fox*, (1912) 71 Wash. 185, 127 Pac. 1111.

<sup>38</sup> See Newell, *Libel and Slander*, 3rd ed., 178.

<sup>39</sup> *Hyde v. State*, (1915) 159 Wis. 651, 150 N. W. 965. So the sale of obscene newspapers may be forbidden. *State v. McKee*, (1900) 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542.

<sup>40</sup> Act June 15, 1917, Chap. 30, Title I, Sec. 3, sustained in *United States v. Pierce*, (1917) 245 Fed. 878.

<sup>41</sup> Laws of 1917, Chap. 463, sustained in *State v. Holm*, (Minn. 1918) 166 N. W. 181.

of speech or of the press. Examples of such statutes declared to be valid are those penalizing utterances or publications tending to encourage the commission of crimes,<sup>42</sup> to prevent or hinder enlistment in the military forces of the United States or of the state,<sup>43</sup> the use of profane language under such circumstances as may disturb the public peace,<sup>44</sup> the publication of false and fraudulent advertisements,<sup>45</sup> or of grossly false reports of judicial proceedings,<sup>46</sup> or forbidding the publishing or sale of newspapers devoted to reports and stories of crime and scandal,<sup>47</sup> or the sending of written or printed communications threatening to accuse the recipient of a criminal action or to attack his reputation or credit.<sup>48</sup> In most instances the publications thus prohibited are crimes, so that the prohibiting statutes are valid under the general rule, but even though they be not crimes at common law, as in the case of fraudulent advertisements, they are removed from the protection of the constitutional guaranty because of the paramount implications incident to all proper exercise of the police power. This principle is strikingly illustrated in a statute passed by the Legislature of Minnesota prohibiting any newspaper from publishing any of the details of a legal execution "beyond a statement of the fact that such a convict was on the day in question duly executed according to law." A newspaper, prosecuted for the violation of this statute, set up in defense its constitutional privilege under the provision of the state constitution that "the liberty of the press shall forever remain inviolate." In sustaining the statute, the court said:<sup>49</sup>

"Appellant argues that there are no constitutional limitations upon the liberty of the press, unless the subject matter be blasphemous, obscene, seditious, or scandalous in its character. This is altogether too restricted a view. The principle is the same, whether the subject matter of the publication is distinctly blasphemous, seditious, or scandalous, or of such character as

<sup>42</sup> *People v. Most*, (1902) 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509.

<sup>43</sup> *United States v. Pierce*, (1917) 245 Fed. 878; *State v. Holm*, (Minn. 1918) 166 N. W. 181.

<sup>44</sup> *State v. Warren*, (1893) 113 N. C. 683, 18 S. E. 498.

<sup>45</sup> *People v. Apfelbaum*, (1911) 251 Ill. 18, 95 N. E. 995; *State v. Blair*, (1894) 92 Iowa 28, 60 N. W. 496.

<sup>46</sup> *State ex rel. Haskell v. Foulds*, (1895) 17 Mont. 140, 42 Pac. 285.

<sup>47</sup> *State v. McKee*, (1900) 73 Conn. 18, 45 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542; *State v. Van Wyl*, (1896) 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

<sup>48</sup> *State v. McCabe*, (1896) 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127.

<sup>49</sup> *State v. Pioneer Press Co.*, (1907) 100 Minn. 193, 110 N. W. 869, 117 Am. St. Rep. 684, 9 L. R. A. (N. S.) 480, 10 Ann. Cas. 351.

naturally tends to excite the public mind and thus indirectly affect the public good."

The universally recognized rule that the liberty of the press guaranteed by the constitution does not affect the power of the courts to punish for contempts, a power inherent in the courts and coeval with the common law,<sup>50</sup> or afford any immunity for libel or slander,<sup>51</sup> may also be amply supported as an existing common law principle embodied by implication in the constitutional provision and qualifying the right thereby guaranteed.

It is necessary to admit, however, that the courts sustain these statutes and enforce these liabilities for the most part either on the ground that since no previous license is required, the liberty of publication is not violated, or on the general theory that it would be "a libel on the Bill of Rights which guarantees free speech to assert that it was intended to protect any one in such despicable practices."<sup>52</sup>

Certain rather surprising results have followed the application of the rule that the guaranty of free publication absolutely forbids any previous restraint upon publication. It has been held broadly on this ground that no court may enjoin an intended publication of any kind, however serious or irreparable may be the threatened damage. "The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly a violation of that purpose." This statement was made as the reason why the California supreme court annulled an order of the superior court enjoining the advertisement and production of a play, which, the complainant alleged, set forth in an unfair and prejudicial manner the facts relating to an alleged murder for which complainant was then on trial for his life.<sup>53</sup> The court admitted that such theatrical representation would interfere with the administration of justice, and prevent a fair trial, but it thought this wrong-doer absolutely protected by the constitution. It may be added that the English courts have never hesitated to enjoin a publication tending to interfere with any kind of judicial proceedings.<sup>54</sup> The decision seems the more unfortunate

<sup>50</sup> *State v. Shepherd*, (1903) 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; *In re Hayes*, (1916) 72 Fla. 558, 73 So. 762, L. R. A. 1917D 192.

<sup>51</sup> Cooley, *Constitutional Law* 302.

<sup>52</sup> *State v. McCabe*, (1896) 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127; *United States v. Pierce*, (1917) 245 Fed. 878.

<sup>53</sup> *Dailey v. Superior Court*, (1896) 112 Cal. 94, 44 Pac. 438, 53 Am. St. Rep. 160, 32 L. R. A. 273.

<sup>54</sup> See *Matthews v. Smith*, (1844) 3 Hare 331; *Kitcat v. Sharp*, (1882) 52 L. J. Ch. 134, 48 L. T. 64; Odgers, *Libel and Slander*, 5th ed., 539.



in view of the common practice of requiring licenses of all theatres, and the recent decision of the Supreme Court of the United States that moving picture productions are not within the purview of this provision, and therefore fully subject to censorship,<sup>55</sup> Some of the courts have based their refusal to enjoin a libel on the ground that the constitution prohibits interference with a libelous publication.<sup>56</sup> As such action finds ample support in the settled rule of equity that no injunction will issue when the law provides an adequate remedy for the threatened injury, it is to be regretted that the constitutional provision was needlessly lugged in.<sup>57</sup>

For a like reason the Nebraska supreme court refused to enjoin publication of a false statement that the complainant would not be a candidate for a public office which he sought. The court was of opinion that "The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government."<sup>58</sup>

The same rigid theory that no previous restraint can be put upon a publication of any kind has been held to render a court powerless to enjoin a boycott, which necessarily involves as its most important feature publication of the strikers' complaints, demands and threats.<sup>59</sup> The Montana supreme court, in refusing to enjoin a boycott, stated that it was "unable to conceive how anyone can possess the right to publish what he pleases, subject only to penalty for abuse, and at the same time be prevented by any court from doing so."<sup>60</sup>

The Supreme Court of the United States, however, has escaped this dilemma by holding, in the celebrated Gompers' contempt

---

<sup>55</sup> *Mutual Film Corp. v. Ohio Industrial Commission*, (1915) 236 U. S. 230, 35 S. C. R. 387, 59 L. Ed. 552, Ann. Cas. 1916C 296. See also *Commonwealth v. McGann*, (1913) 213 Mass. 213, 100 N. E. 355.

<sup>56</sup> *Brandreth v. Lance*, (1839) 8 Paige Ch. (N. Y.) 24, 24 Am. Dec. 368; *Life Ass'n v. Boogher*, (1876) 3 Mo. App. 173.

<sup>57</sup> By statute libels may now be enjoined in England. *Odgers, Libel and Slander*, 5th ed., 426, 428.

<sup>58</sup> *Howell v. Bee Pub. Co.*, (1916) 100 Neb. 39, 158 N. W. 358, L. R. A. 1917A 160.

<sup>59</sup> "The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain the right, except by fear of the penalty, civil or criminal, which may wait on abuse. The general assembly can pass no law abridging the freedom of speech or the press. It can only punish the licentious abuse of that freedom." *Marx, etc., Clothing Co. v. Watson*, (1902) 168 Mo. 133, 67 S. W. 391, 90 Am. St. Rep. 440, 56 L. R. A. 951.

<sup>60</sup> *Empire Theater Co. v. Cloke*, (1917) 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E 383.

case<sup>61</sup> that freedom of publication was not involved since the publication of the unlawful communications and orders was but an incident of the unlawful conspiracy that was enjoined. In Texas it has been held, seemingly without serious effort on the part of the court, that the defendant in a suit for alienation of a wife's affections may be enjoined from speaking or writing to the wayward wife, in spite of the constitutional guaranty of free speech.<sup>62</sup>

It is respectfully suggested that these injunction cases well illustrate the unfortunate consequences of the construction that liberty of the press means absolute absence of previous restraint of any kind upon publications of any kind. It would seem more reasonable, and far more practicable, to say that the constitutional provision in question prohibits any other previous restraints than those recognized and accepted at the time the constitution was adopted, thus leaving the courts free to exercise their equity powers in accordance with settled principles of justice.

The theory of construction which seems to the writer to rest upon sound principle is that the constitutional guaranty in question was intended not only to abolish forever previous censorship of publications by the government, but also to safeguard the citizen from any larger liability for his uncensored publication, or for his public utterance, than was imposed by the rules of the common law as accepted at the time of the making of the federal constitution. It would necessarily follow from the acceptance of this theory that a statute imposing new and distinct restrictions, not recognized by the common law as known by the makers of the constitution, would be void. This theory finds not a little judicial support, though it is not so articulate as one could wish. Justice Harlan, in the case of *Patterson v. Colorado*,<sup>63</sup> dissenting with his usual vigor, said:

"It [the majority opinion] yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such 'previous restraints' upon publications as had been practised by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public requires that to be done. The

---

<sup>61</sup> *Gompers v. Bucks Stove & Range Co.*, (1911) 221 U.S. 418, 31 S. C. R. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

<sup>62</sup> *Ex parte Warfield*, (1899) 40 Tex. Cr. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

<sup>63</sup> (1907) 205 U.S. 454 (464), 51 L. Ed. 879, 27 S. C. R. 556, 10 Ann. Cas. 689.

public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any state, since the adoption of the 14th amendment, can, by legislative enactments or by judicial action, impair or abridge them."

So, in the often cited case of *Cowan v. Fairbrother*,<sup>64</sup> the court said:

"In its broadest sense, 'freedom of the press' includes not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion."

Cases holding unconstitutional the so-called "black-listing" statutes, which require an employer discharging an employee to give him a written statement showing the true reason for his discharge, decide in effect that a statute imposing upon the exercise of freedom of speech a penalty unrecognized by common law standards violates the constitutional provision, though it has no relation to any previous restraints on communication.<sup>65</sup> The same thing may be said of those cases which hold void statutes forbidding and penalizing the nomination, endorsement or recommendation of a candidate for office by a convention or political party, making illegal the publication of any report as to fitness or qualifications of candidates for public office unless accompanied by certain information as to sources.<sup>66</sup> These penalties imposed for publication of statements wholly lawful in accordance with common law standards, abridge the liberty of the press.

We are now ready, in conclusion, to apply the principles worked out to the question, so important in times of national excitement, like the present, as to how far the government can go in suppressing utterances deemed to be injurious to the public safety and welfare, disregarding, for the purpose of this discussion, Professor Fletcher's forceful contention<sup>67</sup> that all constitutional guaranties must yield in time of war to the paramount war power given to Congress and to the President by the consti-

<sup>64</sup> (1896) 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829.

<sup>65</sup> *St. Louis, etc., Ry. Co. v. Griffin*, (1916) 106 Tex. 477, 121 S. W. 703, L. R. A. 1917B 1108; *Wallace v. Georgia, etc., Ry. Co.*, (1894) 94 Ga. 732, 22 S. E. 579. Such statutes have been held valid as a proper exercise of police power. See *Cheek v. Prudential Ins. Co.*, (Mo. 1917) 192 S. W. 387.

<sup>66</sup> *Ex parte Harrison*, (1908) 212 Mo. 88, 110 S. W. 709, 126 Am. St. Rep. 557, 16 L. R. A. (N. S.) 950, 15 Ann. Cas. 1.

<sup>67</sup> 2 MINNESOTA LAW REVIEW 110.

tution, as to which we may safely say that the courts will not have recourse to it except as a last resort.

According to the theory that the guaranty of free speech and free press was intended only to banish all previous restraint, it is clear that Congress or the state legislature can declare any sort of utterance which it deems hurtful to the public welfare to be seditious and punishable so long as it imposes no censorship. It could thus penalize not only such statements as were recognized as seditious at common law, but could also make it a crime to speak or write of the president, the Congress or the courts in such terms of criticism as might not be libelous under common law rules, and yet tend to bring the government and its officers and agencies into popular disesteem. A citizen would be perfectly free to publish what he chose and then take such punishment as might be meted out to him, just as he did in the time of George I. It was on this theory that the infamous sedition laws of 1798 were passed, to be used by the then dominant Federalist party largely for the purpose of oppressing and destroying their political opponents. The constitutionality of this law, vigorously denied by the anti-Federalist party, never came to be passed on by the Supreme Court, then in its trembling infancy, but its unpopularity was so great that the party responsible for it was destroyed. The celebrated Kentucky Resolutions declared the law void as contrary to the constitution, and Jefferson, upon coming to the Presidency in 1801, ordered all prosecutions under it dismissed on the express ground that it was unconstitutional.

According to the second theory of construction, Congress cannot, without unlawfully abridging the freedom of the press, pass any law making utterances punishable as seditious unless such utterances would be regarded as seditious and criminal under the rules of the common law as recognized and accepted in 1787. We may state the rule more concisely thus: whatever utterance was punishable at common law in the colonies as a seditious libel immediately before the constitution was adopted could be made punishable by act of Congress immediately after its adoption in spite of the first amendment, but further Congress was prohibited from going. It will be kept in mind that there can be no common law libel against the government of the United States, since crimes cognizable by the federal courts are purely statutory.<sup>68</sup>

---

<sup>68</sup> Cooley. Constitutional Law 304; *United States v. Hudson*, (1812) 7 Cranch (U. S.) 32, 3 L. Ed. 259.

There can be no doubt that in early times any censuring comment upon the Sovereign, either house of Parliament, or upon the constitution and laws of England, was indictable. Thus in 1629 a merchant was tried before the Star Chamber for saying that a merchant was more "screwed and wrung" in England than in Turkey, found guilty of sedition, since his utterance tended to cast dishonor upon the King's Government, and severely punished.<sup>69</sup> In other cases of the same time even more trivial statements were made the occasion of inflicting savage penalties, but these tyrannous prosecutions provoked such fierce resentment that prosecution for libel against the government never resumed its violent form after the English Revolution. By the time of the American Revolution this terrible agency of oppression had been so modified as to assume a character thus described by a leading authority on English constitutional law:<sup>70</sup>

"The essence of seditious libel may be said to be its immediate tendency to stir up general discontent to the pitch of illegal courses, that is to say, to induce people to resort to illegal methods other than those provided by the Constitution, in order to redress the evils which press upon their minds. If laws are unjust, the legal method is to petition Parliament to amend them. If a minister is obnoxious, the legal method is to petition the Crown to remove him, and failing that to dismiss at the next opportunity those members of Parliament who support him. Whenever a writing is so framed as to urge strongly the people, and especially the ignorant and turbulent portion of the people, to take some shorter and illegal method, not at a future time, but at once, of attaining the end in view, then it may be said to be a seditious libel."

The same author also defined seditious libel as "any words which tend to incite people immediately to take other than legal courses to alter what the Government has in charge."

As Cooley says,<sup>71</sup> it is doubtful whether the common law rule as to seditious libel ever became a part of the common law of the American states, so unsuited is it to American political conditions. Certainly there could be no common law seditious libel upon the Government of the United States, and the founders of that government evidently had no intention that it should ever be set up by statute in its one-time repressive form. But it is inconceivable that they intended to deprive the government of powers to pre-

---

<sup>69</sup> *Rex v. Chambers*, (1629) 3 St. Tr. 373.

<sup>70</sup> Paterson, *Liberty of Press and Speech* 82.

<sup>71</sup> *Constitutional Limitations* 526.

serve itself by making seditious utterances criminal offenses. The reasonable inference is that they intended strictly to limit the new government's statutory powers to penalize utterances as seditious, to those which were seditious under the then accepted common law rule, and that any statutory extension of the definition of the crime was forbidden as an abridgment of the right of free discussion of public affairs, everywhere recognized as absolutely essential to the maintenance of a free government. Therefore we conclude that Congress has power to punish as seditious all utterances, whether spoken or written which advise or tend to cause disobedience to the law, or resistance to its officers, or which tend to subvert the government by inducing or encouraging attempts to change or hinder governmental actions or policies by any other methods than those sanctioned by law, or tend to incite riot and disorder or to cause disturbances of the public peace. On the other hand, Congress has no power to abridge the right freely to discuss all public measures, to expose their defects and urge their alteration or repeal by legal methods, to criticise the constitution and the laws and advocate their amendment, and to comment, however severely if only it be fairly, upon the conduct of the officers of the government. Such adverse comment, so long as it does not tend to excite resistance to the law or breach of the peace, though it may be intemperate and unreasonable, and possibly vexatious and even harmful, is not seditious.<sup>72</sup> Fortunately the vagueness of every statement of what constitutes sedition does not cause so much trouble in the trial of the cause as in the wording of the statute, since if the statute be valid and the

---

<sup>72</sup> Ray, J., in the recent case of *United States v. Pierce*, (1917) 245 Fed. 878 (888), gives this excellent summary statement of what constitutes sedition:

"Citizens have the right to criticize the existing laws, point out their defects, injustice, and unwisdom, and advocate their amendment or repeal; but they have no constitutional right to counsel, advise, encourage, and solicit resistance to the execution of or refusal to obey them. A political party and its individual members may advocate the repeal of existing laws, their amendment and improvement, and point out defects, and a political party may be formed for this very purpose. However, a so-called political party may not be formed to resist the execution of existing laws claimed to be unwise, unpatriotic, and oppressive, and its members permitted to encourage and advocate resistance to their due execution because of their membership therein. The willful resistance to the execution of a valid law may be made a crime, as may the willful obstruction of its enforcement. Any and all resistance and any and all obstruction to the operation or enforcement of a law may be declared an offense. It is the duty of all persons to obey the law and in lawful ways when called upon by due authority to aid in its enforcement. If this is not true, no government can survive."

indictment sufficient, the issue as to whether the utterances complained of are seditious or not will be determined by the jury according as they think the defendant blamable or not. Thus a sedition law, supported by public sentiment, will be enforceable, while one violating the public sense of justice and freedom will register its unfitness in verdicts of acquittal.

W. R. VANCE.

UNIVERSITY OF MINNESOTA.